RECORD AND BRIEFS.

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No. 16-534

IN THE

Supreme Court of the United States

JENNY RUBIN, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF VICTIMS OF IRANIAN TERRORISM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Michael and Linda Bennett, victims of one of many terrorist attacks sponsored by the Islamic Republic of Iran. Amici hold a judgment against Iran for the murder of their daughter, and they have filed proceedings to attach Iranian assets in the United States in satisfaction of their judgments. Accordingly, amici have a direct and substantial interest in the correct interpretation of the Foreign Sovereign Immunities Act ("FSIA") and 28 U.S.C. § 1610(g)(1) in particular.

Iran is a designated state sponsor of terrorism, 50 U.S.C. app. § 4605(j), that has systematically enabled and financed terrorist attacks for almost four decades. For example, in 1983, Hezbollah—sponsored by Iran—detonated a truck bomb at a Marine barracks in Beirut, Lebanon, killing 241 American servicemen and wounding dozens more. *See Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1319–20 & n.6 (2016). The 1996 bombing of the Khobar Towers in Saudi Arabia—another attack accomplished with Iran's material support—killed 19 United States servicemen among many others. *See Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11 (D.D.C. 2011).

Amici are the parents of Marla Ann Bennett, an American who died on July 31, 2002, when a Hamas

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici curiae or their counsel, made a monetary contribution to fund the preparation or submission of this brief. All parties have filed letters with the Clerk consenting to briefs of amici curiae.

operative detonated a bomb at the cafeteria of the Hebrew University of Jerusalem. In an action in federal court in the District of Columbia, amici proved by "evidence satisfactory to the court," 28 U.S.C. § 1608(e), that Iran materially supported Hamas, and was thus liable for the attack that killed their daughter. *See Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007). Amici are among the respondents in this Court in *Bank Melli* v. *Bennett*, No. 16-334. The *Bennett* case illustrates how Section 1610(g)(1) properly functions as a freestanding exception to a foreign state's sovereign immunity, as the Ninth Circuit concluded. *See Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 958–62 (9th Cir. 2016).

Bank Melli is Iran's largest bank, wholly owned by the government of Iran. *Bennett*, 825 F.3d at 957. Bank Melli is owed approximately $18 million in funds by Visa Inc. that are located in the United States and arise from a commercial relationship involving the use of Visa credit cards in Iran. *Ibid.* The *Bennett* Respondents filed a complaint in federal court seeking turnover of the Visa assets to satisfy their judgments against Iran. *Ibid.* The district court concluded that Section 1610(g)(1) allows the *Bennett* Respondents to attach Bank Melli's assets even if those assets are not used for commercial activity in the United States. *Bennett* v. *Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013). The Ninth Circuit affirmed, holding that Section 1610(g)(1) "was meant [by Congress] to allow attachment and execution with respect to *any property whatsoever* of the foreign state or its instrumentality." *Bennett*, 825 F.3d at 961 (emphasis added).

Whereas this case involves extraordinary facts and an attempt to attach museum antiquities, the facts in *Bennett*—which involves money in an account—are much more common among victims invoking Section 1610(g)(1) to execute on their judgments and attach the assets of foreign state sponsors of terrorism.

In this brief, amici argue that construing Section 1610(g)(1) as a freestanding exception to the sovereign immunity of assets of state sponsors of terrorism is most consistent with the statutory text, as well as Congress's manifest purpose to enlarge opportunities for victims of state-sponsored terrorism to access the funds of those terrorist states.

SUMMARY OF ARGUMENT

Section 1610(g)(1) is a freestanding exception to a foreign state's immunity against attachment and execution. Before 2008, Congress perceived multiple problems with the existing statutes authorizing victims of terrorism to obtain judgments against state sponsors of terrorism and then to attempt to satisfy those judgments: (1) Some courts did not recognize a cause of action directly against foreign states (only against their agents); (2) because of sanctions regimes, state sponsors of terrorism generally did not have assets in the United States that were used for a commercial activity, as required for attachment by 28 U.S.C. § 1610(a); and (3) some courts interpreted this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), to mean that victims of state-sponsored terrorism generally could not attach assets of an agency or

instrumentality of the terrorist state in satisfaction of a judgment against the state.

Congress addressed all of these problems when it amended the FSIA in 2008. First, Congress created a broad new cause of action directly against foreign states for their sponsorship of terrorism, in 28 U.S.C. § 1605A(c). At the same time, in order to enable victims to collect on their judgments, Congress paired that cause of action with a similarly broad new provision in Section 1610(g)(1) to govern attachment and execution of assets in satisfaction of judgments entered under Section 1605A. Section 1610(g)(1) empowers victims to attach "the property" of the terrorist state, or of its agencies and instrumentalities, without limitation to assets used for a commercial activity. And Congress further specifically abrogated, in this particular setting, the doctrine emanating from *Bancec* that had been held to limit when the assets of separate juridical entities can be seized in satisfaction of judgments against a foreign state. Section 1610(g)(1) thus makes all property belonging to a terrorist state's agencies and instrumentalities subject to attachment to satisfy a judgment against the state.

The statutory background of Section 1610(g)(1) confirms the text's broad meaning. The legislation was deliberately crafted in order to overcome the barriers that were preventing victims of terrorism from obtaining meaningful recovery. Multiple courts and commentators accordingly have read Section 1610(g)(1) as a freestanding abrogation of attachment-immunity that allows victims of terrorism with judgments under Section 1605A to access *any* property of the foreign state or its agency or instrumentality. In fact, this Court suggested that was the best

reading of the text in dicta in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016).

Section 1610(g)(1) allows attachment "as provided in this section," but Iran is wrong to argue that phrase means that victims of terrorism with judgments under Section 1605A must necessarily satisfy the requirements of another immunity exception set forth in Section 1610, in order to prevent Section 1610(a)(7) from being rendered superfluous. Section 1610(a)(7) is not superfluous, and never has been. Section 1610(g)(1) is available only for victims with judgments "entered under section 1605A." Yet there are many plaintiffs who have judgments against a state sponsor of terrorism under some other cause of action, and for them, Section 1610(a) remains the only viable means of attachment. The fact that Section 1610(g)(1) and Section 1610(a)(7) will *overlap* in certain cases is not surprising or odd in this statute: Congress has repeatedly expanded the rights of victims of terrorism by enacting attachment-immunity exceptions that partially overlap in certain cases. Congress deliberately used Section 1610(g)(1) to give victims a broad new attachment right, thereby ensuring that victims like petitioners and amici can actually collect against state sponsors of terrorism like Iran.

Iran is also wrong to contend that Section 1610(g)(1) does nothing more than abrogate *Bancec* in cases involving the seizure of assets in satisfaction of judgments under Section 1605A. *Bancec* applies only in cases involving the property of a juridical entity separate from the foreign state, so Iran's reading cannot be reconciled with the text of Section 1610(g)(1), which enables victims with judgments under Section 1605A to attach the property of the foreign state *itself*.

The statutory phrase "upon that judgment as provided in this section" refers to Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338–44, which created both 28 U.S.C. § 1610(g)(1) and the cause of action in Section 1605A(c) that enabled victims to obtain "that judgment." That reading is most consistent with the statutory purpose and would avoid the anomalies created by Iran's interpretation. In particular, whereas Iran argues that victims of terrorism with judgments under Section 1605A must overcome the commercial-use requirement in Section 1610(a), that requirement was precisely one of the provisions that frustrated victims of terrorism in their attempts to recover before 2008, and it was those frustrations that Congress sought to eliminate with Section 1610(g)(1). Because state sponsors of terrorism have few assets used for a commercial activity in the United States, Iran's reading of Section 1610(g)(1) would give victims almost no benefit at all. The text of Section 1610(g)(1) does not limit the right to attachment to property that is used for commercial activity, and victims with judgments entered under Section 1605A are entitled to rely on the more specific attachment-immunity exception that was created just for them.

ARGUMENT

28 U.S.C. § 1610(g)(1) Is A Freestanding Exception To Attachment Immunity

A. Congress adopted 28 U.S.C. § 1610(g)(1) in the course of expanding the rights of victims of terrorism

1. The jurisdiction of the United States over persons and property within its territory "is susceptible

of no limitation not imposed by itself." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Accordingly, the immunity of a foreign state in United States courts is "a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004).

Originally, foreign states enjoyed "virtually absolute immunity" from suit. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Before Congress enacted general legislation addressing foreign sovereign immunity, courts looked to the Executive Branch for guidance. *Id.* at 486–87. The Executive ultimately adopted a "restrictive" theory of foreign sovereign immunity, under which foreign states were immune from their public acts, but were not immune for purely "commercial acts." *Id.* at 487.

The FSIA, 28 U.S.C. § 1602 *et seq.*, enacted in 1976, created a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). The FSIA provides that foreign states are generally "immune" from state and federal jurisdiction, 28 U.S.C. § 1604, but it establishes various exceptions permitting particular types of suits, *id.* §§ 1604–1607, including where the claim is "based upon a commercial activity carried on in the United States," *id.* § 1605(a)(2).

The FSIA also addresses the immunity of a foreign state's assets. As originally enacted, the FSIA generally codified the restrictive theory of foreign sovereign immunity. Thus, the property of a foreign state is generally immune from execution, 28 U.S.C. § 1609, subject to exceptions, *id.* §§ 1610–1611. Among other

exceptions, the property of a foreign state in the United States is not immune when it is "used for a commercial activity in the United States" and certain other conditions are satisfied. *Id.* § 1610(a). Similarly, the property of an agency or instrumentality of a foreign state is available to satisfy a judgment against that agency or instrumentality when it is "engaged in commercial activity in the United States" and certain other conditions are satisfied. *Id.* § 1610(b).

2. Congress has continually amended and added to the FSIA's immunity-exceptions to expand plaintiffs' ability to sue foreign states and attach their property. In particular, Congress has repeatedly sought to expand opportunities for victims of state-sponsored terrorism to establish liability and collect damages. Iran has long sponsored and financed terrorist attacks, such as the suicide bombing perpetrated on petitioners here by Hamas. *See* Pet. App. 1–2. But until the mid-1990s, victims of such horrific attacks could not seek damages or enforce judgments against Iran; "foreign States were immune from civil liability in U.S. courts for injuries caused by acts of terrorism carried out by their agents and proxies," because such acts of terrorism were not viewed as "commercial activity." Jennifer K. Elsea, Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* 1 (2008); *see also Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361–62 (1993).

Beginning in 1996, Congress amended the FSIA several times in order to enable victims of terrorism to sue state sponsors of terror and to enforce their judgments. In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Congress created a new exception to

the FSIA's immunity from jurisdiction to permit lawsuits by U.S. nationals alleging commission of or support for an act of terrorism against designated state sponsors of terrorism. *Id.* at § 221, 110 Stat. at 1241–43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)). At the same time, AEDPA matched that exception from jurisdictional immunity from suit with a new exception to the FSIA's immunity from attachment and execution. The new Section 1610(a)(7) permitted seizure of the foreign state's assets when they were "used for a commercial activity in the United States" and the party seizing the assets held a judgment that "relates to a claim for which the foreign state is not immune under section 1605(a)(7)." AEDPA § 221, 110 Stat. at 1243 (codified at 28 U.S.C. § 1610(a)(7) (2006)). Similarly, if "the judgment relates to a claim for which" the foreign state's "agency or instrumentality is not immune by virtue of ... section 1605(a)(7)," then execution is possible against the property of that agency or instrumentality if it "engage[s] in commercial activity in the United States." 28 U.S.C. § 1610(b)(3).

But AEDPA did not immediately succeed in allowing victims of state-sponsored terrorism to obtain redress. Some courts held that 28 U.S.C. § 1605(a)(7) and its amendments did not create a cause of action against foreign states (only against their agents), requiring plaintiffs to rely on widely varying state-law wrongful death and personal injury causes of action against foreign states. *See, e.g.*, *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1027 (D.C. Cir. 2004). Moreover, when victims did obtain judgments, they often could not collect because state sponsors of terrorism—which were usually subject to an array of

sanctions—conducted few commercial activities in the United States that would potentially make property available for attachment under Section 1610(a)(7) or (b)(3). *See* Elsea, *supra*, at 7–9; *Flatow* v. *Islamic Republic of Iran*, 76 F. Supp. 2d 16, 24 (D.D.C. 1999) (bank accounts were not related to commercial activity and thus not subject to attachment under Section 1610(a)(7)).

In addition, based on this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 620–21 (1983), courts generally rejected efforts by plaintiffs to satisfy their judgments against state sponsors of terrorism by seizing assets of agencies or instrumentalities of those states. *See, e.g.*, *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1287 (11th Cir. 1999); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002). *Bancec* had established a general presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626–27. After *Bancec*, some courts pronounced five "*Bancec* factors" to determine whether the presumption of separateness has been overcome. *See Walter Fuller Aircraft Sales* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Although the text of Section 1610(a)(7) seems to allow seizure of an instrumentality's assets that are used for a commercial activity in the United States—it allows qualifying judgments against "the foreign state" to be enforced against property in the United States of the "foreign state, as defined in [28 U.S.C. § 1603(a)]," including "an agency or instrumentality of a foreign state," *id.* § 1603(a)—cases like *Alejandre*

and *Flatow* invoked the "*Bancec* factors" and held that the presumption of separateness had not been overcome, so the property of agencies or instrumentalities could not be seized.

In 2008, Congress addressed all of these problems—the absence of a clear federal cause of action against terrorist states; the limitation of seizures to the virtually non-existent category of assets "used for a commercial activity in the United States"; and the inability to recover from the agencies and instrumentalities of terrorist states—by amending the FSIA as part of the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA") § 1083, Pub. L. No. 110-181, 122 Stat. 3, 338–44. Congress abrogated *Cicippio-Puleo* by creating a new, more expansive federal-law cause of action directly against foreign-state sponsors of terrorism for their support of terrorist attacks. 28 U.S.C. § 1605A(c); *see also Owens* v. *Republic of Sudan*, 864 F.3d 751, 765 (D.C. Cir. 2017). And in the same Section of the 2008 NDAA, Congress created Section 1610(g)(1), a new provision to govern attachment and execution against the assets of a foreign state and its agencies and instrumentalities in terrorism cases.[2]

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[2] Today, the remaining designated state sponsors of terrorism are Iran, Sudan, and Syria. *See* 31 C.F.R. § 596.201 note. So Section 1605A and the attendant attachment-immunity exception in Section 1610(g)(1) can be applied against the assets only of those states.

B. Section 1610(g)(1)'s text and structure allow victims to attach any property of a foreign state sponsor of terrorism or its instrumentalities

The text of 28 U.S.C. § 1610(g)(1)—in contrast to earlier statutes that provided for seizure of foreign states' assets—uses exceedingly broad and encompassing language to describe terrorism victims' entitlement to attachment and execution. When a victim has obtained a "judgment ... under section 1605A" against a foreign state sponsor of terrorism for its role in carrying out or facilitating terrorism, "*the property* of [the] foreign state, ... and *the property* of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, *is subject to attachment* in aid of execution, and execution, upon that judgment as provided in this section." *Ibid.* (emphases added). The assets are subject to attachment "regardless of" the *Bancec* factors. *Ibid.*

Thus, by the plain text of the statute, Section 1610(g)(1) does multiple things at once for victims of terrorism with judgments under Section 1605A: First, in cases where a victim locates property of the terrorist state itself, Section 1610(g)(1) abrogates execution and attachment immunity and enables the victim to attach "the property." Second, in cases where the victim locates the property of the terrorist state's agency or instrumentality, Section 1610(g)(1) additionally makes that property available to satisfy the Section 1605A judgment. And for those latter cases, the statute also specifically abrogates the *Bancec* factors, making pellucid Congress's intention that the assets of any agency or instrumentality of a terrorist state be

available for seizure "regardless of" its status as a separate juridical entity.

This comprehensive right to attachment is consistent with the structure of the FSIA as a whole after Congress amended it in the 2008 NDAA. The attachment provision in Section 1610(g)(1) corresponds to the new cause of action in Section 1605A that Congress created in the same section of the same legislation. When Congress gave to certain victims of state-sponsored terrorism a new federal cause of action against terrorist states, 28 U.S.C. § 1605A(c), it also provided to persons with judgments under that new cause of action the right to seize, in satisfaction of those judgments, the assets of both the terrorist state and its agencies and instrumentalities. That is why the 2008 NDAA labeled Section 1610(g)(1) as a "conforming amendment[ ]" to the provision that created Section 1605A. 2008 NDAA § 1083(b)(3), 122 Stat. at 341. The breadth of Sections 1605A and 1610(g)(1) accord with each other, and the provisions work together to overcome the barriers that existed under the prior version of the FSIA and thereby enable meaningful recovery for victims.

Congress well understood that it was according terrorism victims an extremely powerful new tool to obtain redress, but at the same time tethering that tool to the new federal cause of action under Section 1605A. For that reason, Congress included in the 2008 NDAA a provision allowing plaintiffs who had previously proceeded under Section 1605(a)(7)'s immunity exception to convert their judgments or refile their claims under Section 1605A. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(II).

C. Section 1610(g)(1)'s background and purpose confirm the meaning of the broad text

It is undisputed that, in the 2008 NDAA, Congress "meant to expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism." *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 961 (9th Cir. 2016).

The legislation that eventually became Section 1610(g)(1) first was debated in 2005. *See* A bill to amend title 28, S. 1257, 109th Cong. (1st Sess. 2005); To amend title 28, H.R. 865, 109th Cong. (1st Sess. 2005). Senator Specter, in his remarks introducing the bill, stated that it would "clarif[y] a private right of action, in Federal courts, for U.S. citizens against state sponsors of terrorism and will ultimately make it easier for victims of such acts to collect court-ordered damages against state-sponsors of terrorism." 151 Cong. Rec. S6746 (daily ed. June 16, 2005) (statement of Sen. Specter). Regarding attachment, Senator Specter stated that the bill would "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism," referencing *Bancec* in particular. *Ibid.* Senator Specter stated that the bill would "ease the burden on the families of victims of terrorism by permitting them to attach the hidden assets of terrorist states held within the United States." *Ibid.* Senator Specter's bill died in committee.

In 2007, Senator Lautenberg introduced a new bill that was ultimately enacted as part of the 2008

NDAA. Justice for Victims of State Sponsored Terrorism Act, S. 1944, 110th Cong. (1st Sess. 2007). The Report of the Conference Committee described the legislation as "expand[ing] the ability of claimants to seek recourse against the property of [terrorism-sponsoring] foreign state[s]" by "permitting any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.). The Conference Report then reiterated that "the provision is written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Id.* at 1001–02 (emphasis added).

After the 2008 NDAA was enacted, a report on it by the Congressional Research Service likewise stated that "the purpose of th[is] provision is to enable any property in which the foreign state has a beneficial ownership to be subject to execution for terrorism judgments, except for diplomatic and consular property," and that "[t]he language renders subject to execution any property" that belongs to "the defendant foreign State." Elsea, *supra*, at 55.

Section 1610(g)(1)'s legislative history thus confirms what its text shows. The provision accomplishes two goals: (1) it expands the universe of foreign-state assets and foreign-instrumentality assets that are available for attachment and execution upon Section 1605A judgments in order to sweep in not just assets "used for a commercial activity in the United States," 28 U.S.C. § 1610(a), but "any property interest" of a terrorist state; and (2) for assets held in the name of separate juridical entities, Section 1610(g)(1) specifically abrogates *Bancec* as a barrier to attachment.

The statute "permit[s] any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment," H.R. Rep. No. 110-477, at 1001, and "renders subject to execution any property" of "the defendant foreign State," Elsea, *supra*, at 45–46, "upon the satisfaction of a 'simple ownership' test," 154 Cong. Rec. S55 (daily ed. Jan. 22, 2008) (statement of Mr. Lautenberg), without regard to whether the property is used for a commercial activity.

D. Courts and commentators have understood Section 1610(g)(1) to be a freestanding exception to attachment immunity

1. The vast majority of courts to interpret Section 1610(g)(1) have read it as just such a freestanding abrogation of attachment immunity. In fact, this Court read Section 1610(g)(1) that way (albeit in dicta) in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016). There, the Court explained that "[v]ictims of state-sponsored terrorism ... have often faced practical and legal difficulties" enforcing their judgments. *Id.* at 1317–18. At first, "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318 (quoting 28 U.S.C. § 1610(a)(7), (b)(3)). But then in 2008, Congress enacted Section 1610(g)(1), which "expand[ed] the availability of assets for postjudgment execution" by "mak[ing] available for execution the property ... of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state." *Id.* at 1318 n.2. This Court's opinion in *Bank Markazi* shows that the simplest reading of Section 1610(g)(1) is also the best: The provision abrogates immunity against execution

for judgment-holder victims; it does not force those victims back into the difficult task of satisfying the commercial-use requirement of Section 1610(a).

Moreover, until the Seventh Circuit's opinion in this case, every court of appeals to consider the issue had held or suggested that Section 1610(g)(1) created a freestanding exception to attachment immunity. The Second Circuit, for instance, stated that Section 1610(g)(1) "allow[s] attachment of property of a foreign state against which a judgment is entered under section 1605A." *Calderon-Cardona* v. *Bank of New York Mellon*, 770 F.3d 993, 999 (2d Cir. 2014). The Second Circuit also made clear that "Section 1610(g) not only allows attachment of property of a foreign state but also property of an agency or instrumentality that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." *Ibid.* The Second Circuit thus helpfully distinguished Section 1610(g)(1)'s two effects: (1) abrogating attachment immunity for all foreign-state and foreign-instrumentality property in Section 1605A cases; and (2) abrogating the *Bancec* presumption and use of the *Bancec* factors in cases involving separate juridical entities. *See also Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2d Cir. 2016) ("Section 1610(g) strips FSIA attachment immunity from the property of a 'foreign state' or of its 'agency or instrumentality' if the underlying judgment was entered under § 1605A's terrorism exception.").

The D.C. Circuit also has stated that, "[o]nce a Section 1605A judgment is obtained, Section 1610(g) strips execution immunity from *all* property of a defendant sovereign." *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Section

1610(g)(1) "subjects to attachment the property of a foreign state and the property of an agency or instrumentality of such a state against which a plaintiff holds a judgment under 28 U.S.C. § 1605A." *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937 (D.C. Cir. 2013). Thus, Section 1610(g)(1)'s "requirements" are "satisfied" if the assets at issue are "property" of "a foreign state" against whom "plaintiffs hold a judgment under ... 28 U.S.C. § 1605A." *Id.* at 937–38 (internal quotation marks omitted).

And in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), where amici are plaintiffs, the Ninth Circuit dealt extensively with this question. The court held that "subsection (g) contains a free-standing provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." *Id.* at 959. That provision "covers a different subject than § 1610(a) through (e): by its express terms, it applies only to 'certain actions,' specifically, judgments 'entered under Section 1605A.'" *Ibid.* "By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like)." *Ibid.* Therefore, "Section 1610(g) requires only that a judgment under § 1605A have been rendered against the foreign state; in that event, both the property of the foreign state and the property of an agency or instrumentality of that state are subject to attachment and execution." *Ibid.* *Bennett* was also consistent with a prior opinion from the Ninth Circuit, which had interpreted Section 1610(g)(1) as "expand[ing] the category of foreign sovereign property that can be attached; judgment creditors can now

reach any U.S. property in which Iran has any interest." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010).

Before *Rubin*, the Seventh Circuit had twice interpreted Section 1610(g)(1) as a freestanding abrogation of attachment immunity, holding that the provision "authorizes attachment of property of foreign state sponsors of terrorism and their agencies or instrumentalities to execute judgments under § 1605A for state-sponsored terrorism" even when plaintiffs "are not seeking attachment under § 1610(a) or (b)." *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 575 (7th Cir. 2014). The Seventh Circuit in *Gates* stated that when Congress "replaced the then-existing terrorism exception to immunity ... with a broader terrorism exception" in Section 1605A, Congress matched that broad cause of action with Section 1610(g)(1), a "powerful attachment provision available only to victims of state-sponsored terrorism who hold judgments under § 1605A." *Ibid.* And in *Wyatt* v. *Syrian Arab Republic*, the Seventh Circuit held that Section 1610(g)(1) is not subject to Section 1610's other requirements, which is "consistent with" Congress's purpose "to make it easier for terrorism victims to obtain judgments and to attach assets." 800 F.3d 331, 343 (7th Cir. 2015). *See also* Pet. App. 41 (Hamilton, J., dissenting from denial of rehearing en banc) ("[I]n interpreting an ambiguous statutory text [like Section 1610(g)(1)], we can and should draw on statutory purpose and legislative history.").

Many district courts have come to the same conclusion. *See, e.g.*, *Martinez* v. *Republic of Cuba*, 149 F. Supp. 3d 469, 473 (S.D.N.Y. 2016) ("FSIA Section

1610(g) abrogates sovereign immunity against execution for judgments under Section 1605A."); *Kapar* v. *Islamic Republic of Iran*, 105 F. Supp. 3d 99, 107 (D.D.C. 2015) ("for awards under Section 1605A, the property of a foreign state, agency, or instrumentality available for attachment is not limited by any reference to 'commercial activity.' ... Congress therefore made it much easier for Section 1605A plaintiffs to collect on their judgments"); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 984 F. Supp. 2d 1070, 1094–95 (S.D. Cal. 2013) ("The plain language of the statute supports a broad reading. Section 1610(g) allows attachment of any 'property of a foreign state against which a judgment is entered under Section 1605A.' Congress did not qualify the definition by limiting it to property connected to a commercial activity."); *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 19 n.8 (D.D.C. 2011) ("[Section] 1610(g) does not limit attachment to property used in 'commercial activity'—unlike the execution provisions found in § 1610(a) & (b)."); *but see Owens* v. *Republic of Sudan*, 141 F. Supp. 3d 1, 6 (D.D.C. 2015) ("[Section] 1610(g) is not [a] freestanding immunity exception.").

2. Numerous legal treatises and commentators have also understood Section 1610(g)(1) as *both* broadening the scope of foreign-state and foreign-instrumentality assets that can be attached to satisfy Section 1605A judgments, *and* abrogating the *Bancec* presumption for separate juridical entities. One treatise states that Section 1610(g)(1) "limit[s] the application of foreign sovereign immunity" as a "defense[ ] to post-judgment attachment or execution with respect to

property belonging to designated state sponsors of terrorism." 3 Louis B. Kimmelman & Steven L. Smith, *Business and Commercial Litigation in Federal Courts* § 21:67 (4th ed. 2016).

Similarly, a prominent textbook states that Section 1610(g)(1) "exposes to attachment most property in which a foreign state has an interest, when that state has a judgment entered against it under §1605A." Stephen Dycus, et al., *Counterterrorism Law* 949 (3d ed. 2016). While Section 1610(a) is limited to assets "used for a commercial activity," Section 1610(g)(1) "broadened the universe of exposed assets further [beyond Section 1610(a)] to include most property in which the foreign state has any interest." *Id.* at 951.

Wright & Miller's leading treatise acknowledges that, in addition to abrogating the *Bancec* presumption, "Section 1610(g) also may provide a basis for attaching property, regardless of commercial use, in aid of execution of a judgment entered under the terrorism exception." 14A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3662.4 (4th ed. 2017).

3. The attachment provision in Section 1610(g)(1) is intentionally broad to reach a wide variety of foreign-state assets. At the time of the 2008 NDAA, museums and archaeological societies understood that Section 1610(g)(1) would subject to attachment and execution art pieces loaned from a state sponsor of terrorism to a United States museum, even if the pieces were not used for a commercial activity. Just after the 2008 NDAA was passed, Syria –another state sponsor of terrorism—cancelled its planned loan of 55 artifacts

to the Metropolitan Museum of Art ("Met"), lest victims of Syrian terrorism attach the museum pieces. *See* Holland Cotter, *Art Review, Beyond Babylon: Global Exchange, Early Version*, N.Y. Times (Nov. 20, 2008) (describing the Met's statement that "recent legislation ... has made it too difficult and risky for the planned loans to proceed"). The Archaeological Institute of America ("AIA") issued a public statement describing the "concern," "in light of the 2008 amendments," that "the objects" would not be protected "from attachment by individuals who have claims against Syria for supporting terrorist activity." AIA, *On the Attachment of Cultural Objects to Compensate Victims of Terrorism* (Feb. 9, 2009)[3]; *see also* Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* 117 (2012) (describing the incident).

Taking all of these sources together, an overwhelming weight of authority has supported treating Section 1610(g)(1) as a freestanding exception to the attachment immunity of a terrorist state.

E. Iran's narrow reading of Section 1610(g)(1) cannot be reconciled with the statute's text and purpose

1. Iran's argument rests entirely on the clause in Section 1610(g)(1) stating that foreign-state property is subject to attachment "as provided in this section." Iran argues that those five words drastically change the meaning of the statute from a provision that made available for seizure all property interests of state-sponsors of terrorism into a mere abrogation of

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[3] https://goo.gl/EgXauQ

Bancec's presumption of separateness, so that a terrorism victim must still rely on some other provision of section 1610 to overcome the immunity against attachment of foreign-state property. Iran further contends that this interpretation of "as provided in this section" is necessary in order to avoid reading Section 1610(g)(1) in a way that would render Section 1610(a)(7) superfluous. Br. in Opp. of Iran at 12; *see also* Br. for the United States as Amicus Curiae Supporting Certiorari at 12. Iran is wrong. Although the two statutes will overlap in certain cases, Section 1610(g)(1) is at once both broader and narrower than Section 1610(a)(7).

i. First, Section 1610(g)(1) is broader because, whereas Section 1610(a)(7) removes immunity only for a foreign state's property that is "used for a commercial activity in the United States," Section 1610(g)(1) removes immunity from "the property of a foreign state" and "the property of an agency or instrumentality" of that state. Section 1610(g)(1)'s text has no "commercial use" limitation.

At the same time, however, Section 1610(g)(1) is also narrower than Section 1610(a)(7). While Section 1610(g)(1) requires "a judgment ... entered under section 1605A," Section 1610(a)(7) applies to any judgment that "relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)." That latter category includes terrorism claims against terrorist states as to which Section 1605A(a)(1) vitiates immunity, but which proceed under state-law causes of action rather than the federal cause of action created by Section 1605A(c). *See Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841

(D.C. Cir. 2009) ("[I]f an FSIA exception abrogates immunity, plaintiffs may bring state law claims that they could have brought if the defendant were a private individual."). There are numerous victims of state-sponsored terrorism for whom Section 1605A does not provide a cause of action, because the plaintiffs are not nationals of the United States, members of the armed forces, or employees or contractors of the United States government, as required by 28 U.S.C. § 1605A(c)(2)(A)(ii). *See, e.g.*, *Peterson* v. *Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44–45 (D.D.C. 2007) (plaintiffs obtained judgments against Iran under state law), *overruled on other grounds by Lin* v. *United States*, 561 F.3d 502, 208 (D.C. Cir. 2009). For these victims and others proceeding under state law, Section 1610(a)(7) remains the primary operative attachment provision.

The United States has argued that Section 1610(a)(7) was "irrelevant" at least at the time the 2008 NDAA was passed because in that bill, Congress amended Section 1610(a)(7) by striking out the reference to Section 1605(a)(7) and replacing it with a reference to Section 1605A, so that at the time, Section 1610(a)(7) "referred *solely* to judgment creditors under Section 1605A." Br. for the United States as Amicus Curiae Supporting Certiorari at 12. But the United States has conflated the abrogation of immunity in Section 1605A, which is what matters for purposes of Section 1610(a)(7), with the cause of action in Section 1605A, which is what matters for Section 1610(g)(1). Even at the time of the 2008 NDAA, Section 1610(a)(7) remained quite relevant to any terrorism plaintiff who was using the immunity-waiver in Section 1605A(a)

but who was proceeding under a state-law cause of action. For those plaintiffs, their judgments would "relate[ ] to a claim for which the foreign state is not immune under section 1605A," 28 U.S.C. § 1610(a)(7) (2008), but the judgments would not be "entered under section 1605A," and thus the judgments could be enforced under Section 1610(a)(7) but not Section 1610(g)(1). Reading Section 1610(g)(1) as a freestanding abrogation of immunity for Section 1605A judgment-holders has never rendered other provisions of the FSIA superfluous.[4]

ii. To be sure, Section 1610(g)(1) and Section 1610(a)(7) will sometimes overlap: There are some victims of terrorism, and some categories of foreign-state assets, where execution would be possible under either Section 1610(g)(1) or the commercial-use exception. Indeed, *Bennett* is just such a case. *See Bennett*, 825 F.3d at 967 (Benson, J., concurring in part and dissenting in part). But in this statute, that overlap is not surprising or noteworthy. Section 1610(g)(1) was not the first time that Congress created overlapping categories of attachment immunity. There can be no doubt that 28 U.S.C. § 1610(f)(1) is a freestanding exception to attachment immunity for foreign-state assets subject to sanction, yet it was entirely possible that those same assets would be used by the foreign

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[4] Congress later realized that not every litigant proceeding under the old Section 1605(a)(7) would convert their case to one under the new Section 1605A, so in 2012 it added back in to Section 1610(a)(7) a reference to cases where the plaintiff used the immunity-exception in Section 1605(a)(7). *See* Iran Threat Reduction and Syria Human Rights Act of 2012 § 502(e)(1)(A), Pub. L. No. 112-158, 126 Stat. 1258, 1260.

state "for a commercial activity," and so would be attachable for that reason as well. After Section 1610(f)(1) was enacted, President Clinton exercised the authority granted to him to waive that provision. *See* 28 U.S.C. § 1610(f)(3); Determination of President of the United States, No. 2001-3, 65 Fed. Reg. 66,483 (Oct. 28, 2000). But that was a discretionary determination that can be revisited by the president at any time, thereby restoring the statutory overlap.[5]

When Congress wrote the 2008 NDAA, it was unsatisfied with the existing options for attachment and execution that were available to terrorism victims. Rather than use a scalpel to precisely tailor the existing Section 1610(a)(7) in just-the-right way, Congress painted over the existing regime with a broad new attachment-immunity provision in Section 1610(g)(1) that spared many terrorism victims—but not all, just those with judgments "entered under section 1605A"—the effort, time, and expense of demonstrating that the terrorist state's interest in property was used for a commercial activity or owned by the sovereign itself and not through an instrumentality.

Though certainly "there are times" when Congress enacts a provision that renders an earlier enacted provision "superfluous," *Microsoft Corp.* v. *I4I Ltd. P'ship*, 564 U.S. 91, 107 (2011), at least for victims of state-sponsored terrorism with judgments under state-law

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[5] Similarly, the Terrorism Risk Insurance Act of 2002 ("TRIA") § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337, overlaps with Section 1610(g)(1) and Section 1610(f) by independently making blocked assets like those at issue in *Bennett* subject to attachment. *See Bennett*, 825 F.3d at 957–58 (majority op.).

causes of action, the 2008 NDAA did not convert Section 1610(a)(7) into mere "verbosity and prolixity." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 236 (2011). Rather, Section 1610(a)(7) was a vital means—indeed, the only realistic means—of obtaining redress for some victims. There is simply no adverse inference to be drawn from the fact that Congress has created a system that allows certain categories of assets to be attached pursuant to multiple different sources. That has been an intentional part of Congress's design of the FSIA's terrorism exceptions for more than a decade.

2. "[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft*, 564 U.S. at 106 (quotation marks omitted). And here, Iran's interpretation of Section 1610(g)(1) "has a superfluity problem of its own." *Bruesewitz*, 562 U.S. at 236 n.48.

Iran's argument, adopted by the Seventh Circuit below, is that Section 1610(g)(1) does only one thing: "[I]t partially abrogates the so-called *Bancec* doctrine, which holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality." Pet. App. 4; *see also* Br. in Opp. of Iran 17 (Section 1610(g)(1) "merely eliminates the five *Bancec* factors as a barrier to recovery."). But that *cannot* be all the statute does, because *Bancec* is relevant only to cases involving an entity that is juridically separate from the foreign state itself. *See* 462 U.S. at 626–27 ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); *Hester Int'l Corp.* v. *Fed. Republic of Nigeria*, 879 F.2d 170, 179 (5th Cir. 1989)

(*Bancec* guides the "determination of whether a government instrumentality is a separate juridical entity"). Section 1610(g)(1), on the other hand, reaches further: It subjects to attachment "the property *of a foreign state*." (Emphasis added.) If Iran were right that Congress's sole objective for Section 1610(g)(1) was to abrogate *Bancec*, then Congress would not have needed to authorize separately the seizure of "the property of a foreign state." On Iran's reading, that portion of the text is simply duplicative of the right to seize assets of a foreign state that is already provided by Section 1610(a).

In other words, on Iran's view of the statute, Section 1610(g)(1) could have achieved the same meaning if Congress had said, "when a judgment is entered against a foreign state under section 1605A, the property of an agency or instrumentality of such a state is subject to attachment." But in fact, Congress authorized attachment of "the property of a foreign state ... *and* the property of an agency or instrumentality of such a state." 28 U.S.C. § 1610(g)(1) (emphasis added).

Iran has attempted to evade this problem by arguing that Section 1610(g)(1)'s abrogation of *Bancec* applies in seizure proceedings under both Section 1610(a)(7) and Section 1610(b)(3). But that cannot be right, either. Under Section 1610(b)(3), the plaintiff is seizing the assets of an agency or instrumentality to satisfy his judgment against *that* agency or instrumentality; the statute requires a judgment on "a claim for which the *agency or instrumentality* is not immune." 28 U.S.C. § 1610(b)(3) (emphasis added). In that scenario, *Bancec* and its factors for assessing separate juridical status from the sovereign have no relevance. So if Iran were right and Congress meant to do

nothing more than abrogate *Bancec*, leaving victims limited to assets used for a commercial activity, then Section 1610(g)(1) ought to have said "as provided in *sub*section (a)(7)."

3. The best understanding of the phrase "upon that judgment as provided in *this section*" is that it refers to Section 1083 of the 2008 NDAA, which created both Section 1610(g)(1) and Section 1605A. *See* 122 Stat. at 341. It is the 2008 NDAA that is authoritative law. *See Stephan* v. *United States*, 319 U.S. 423, 426 (1943) (the Statutes at Large, not the United States Code, are controlling law); *see generally* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283, 284 (2007). "[A]s provided in this section" modifies "that judgment," meaning "a judgment ... entered under section 1605A," 28 U.S.C. § 1610(g)(1), and it was Section 1083 of the 2008 NDAA that created the federal cause of action in Section 1605A(c) for victims of terrorism to obtain a judgment against terrorist states. Section 1083 also created the new remedial provision applicable to such judgments, allowing the holder to seize any interest in property of the terrorist state.

Congress used the phrase "this section" several times in Section 1083 of the 2008 NDAA, and some of those other uses unambiguously refer to Section 1083. *See, e.g.*, § 1083(c), 122 Stat. at 342 ("The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code."); § 1083(e), 122 Stat. at 344 ("If any provision of this section ... is held invalid, the remainder of this Section ... shall not be affected[.]"). Unfortunately, in Section 1610(g)(1), Congress unintentionally created an ambiguity by using the phrase "this section" while at the

same time directing that the new provision be codified in a particular part of the United States Code, namely 28 U.S.C. § 1610(g)(1). But that ambiguity should be resolved by Congress's purpose for this statute. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538–39 (1947) (the "policy" of a statute "is evinced in the language of the statute, as read in light of the other external manifestations of purpose"). It is clear from the statutory background, the Conference Report, and the understanding of multiple courts and commentators since enactment that Congress's purpose was to make it significantly easier for victims of terrorism to effectively execute on their judgments. Reading "as provided in this section" in Section 1610(g)(1) to refer to Section 1083 would both support the statutory purpose and avoid the textual anomalies created by Iran's interpretation.

Iran's reading, by contrast, would force victims to overcome the onerous commercial-use requirement in Section 1610(a)(7), which, given the dearth of assets of terrorist states that are "used for a commercial activity in the United States," is tantamount to leaving victims with no additional means of redress at all. That is clearly not what Congress intended. Congress knew that, before the 2008 NDAA, the commercial-use requirement in Section 1610(a) was among the barriers frustrating terrorism victims in their attempts to collect on their judgments. *See Rubin* v. *Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006); *Flatow*, 76 F. Supp. 2d at 24; Elsea, *supra*, at 7–9. And yet according to Iran, Section 1610(g)(1) did nothing to benefit these victims because it made no change to the commercial-use requirement. Iran's reading

would significantly undermine the benefit to terror victims —particularly victims of *Iranian* terrorism— that was one explicit purpose of the 2008 NDAA.

Congress did not insert any language about commercial activity into the attachment-immunity exception in Section 1610(g)(1), and this Court has no call to insert that missing language. *See Dean* v. *United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." (citation omitted)). Nor did Congress's new attachment-immunity exception refer back to Section 1610(a), even though Congress knows how to do that: Section 1610(c) provides special service requirements that explicitly apply only to "subsections (a) and (b) of this Section." If Congress had meant to limit Section 1610(g)(1)'s attachment right to the terms of Section 1610(a), it would have done so.

Section 1610(a) is the FSIA's *generic* provision for executing on a judgment—of whatever kind—against a foreign sovereign, whereas Section 1610(g)(1) was created specifically to address victims of terrorism with judgments under Section 1605A. Victims seeking to execute on their judgments are entitled to rely on the more specific provision that addresses their particular situation in Section 1610(g)(1), without being forced back into the more general attachment provision in Section 1610(a). *See Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general. ... A general [provision] cannot be allowed to supersede the specific [provision.]").

CONCLUSION

Congress's path of legislation has continually attempted to make it easier for judgment-creditors to collect against terrorist states. Section 1610(g)(1) is among the most expansive of these efforts. The provision is a freestanding abrogation of immunity that means just what it says: *The property* of a foreign state, or of its agencies and instrumentalities, is available to satisfy a Section 1605A judgment against that state for its sponsorship of terrorism.

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted.

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